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No. 84-1233

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,

vs.

SECRETARY, DEPARTMENT OF THE INTERIOR,
Respondent.

vs.

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondent-Intervenor.

REPLY BRIEF

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REPLY BRIEF

1. The Tribe's Contention That The Decisions Below Are Consistent With *Nevada v. United States* Cannot Be Sustained.

In the Petition, TCID demonstrated the conflict between this Court's decision in *Nevada v. United States,* 463 U.S. 110 (1983), and the decisions below. It is indeed telling that the only counter-argument the Tribe can muster relies on misrepresentation of the origin, the purpose, and the impact of the operating criteria the enforcement of which was upheld therein.

The Tribe belatedly attempts to deny that the operating criteria drastically reduced the farmers' *Orr Ditch* rights.[1] It now asserts that the criteria were "intended only to reduce the *volume of*

[1] The pertinent portions of the *Orr Ditch* decree, entered in *United States v. Orr Water Ditch Co., et al.,* Equity No. A-3 (D.Nev. 1944), of which this Court can take judicial notice, see F.R.E. Sec. 201, are reproduced in the Appendix to Truckee-Carson Irrigation District's

water diverted," but "in no way were designed to diminish the farmers' *water duty.*" (Emphasis added.) Tr. Br. at 12. The Tribe's suggestion that the criteria were premised on reducing conveyance or storage losses on the Project rather than on reduction in the farmers' water duty entitlements is flatly untrue, as even the Tribe admits elsewhere in its brief. Tr. Br. at 14-15. We agree with the Tribe's later admission that "[i]t is abundantly clear that *the criteria were premised on water duty.*" (Emphasis added.) *Id.* And, as the Ninth Circuit found in the *Alpine* case, "a reduction to the 3 afa water duty sought after by the United States would drastically reduce the farmers' yields over the long term." *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 857 (9th Cir. 1983).

Respondent United States freely acknowledges the conflict between the diversion limits imposed by the criteria and the water duty guaranteed the farmers by the *Orr Ditch* final decree and affirmed in *Nevada v. United States, supra.* Its pending legal challenge to the *Orr Ditch* watermaster's diversion of water from the Truckee River to satisfy the Newlands farmers' rights is based on its contention that such diversion "directly conflicts with the order of the District of Columbia District Court [*Tribe v. Morton*] enjoining storage in Lahonton Reservoir." App. A-158. And the United States is currently revising the operating criteria to remedy the very conflict with the farmers' decreed rights which precipitated this litigation and which the Tribe now denies. *See* Tr. Br. at 13 n.12.[2]

Similarly incomprehensible is the Tribe's assertion that

Petition for Certiorari in *Nevada v. United States,* No. 81-2276 in this Court.

[2] The United States' statements that interim criteria have been adopted and promulgation of revised criteria is imminent are incorrect, as well as unsupported by citation. The interim criteria proposed by the Secretary were rejected by the *Tribe v. Morton* court on September 27, 1984 and TCID is unaware of any new operative criteria in effect at this time. And TCID has been informed by Interior that environmental studies of the impacts of proposed new criteria will delay substantially their promulgation as well as any decision on diversion criteria to be established therein.

> the fact that reduced diversions would result in more Truckee River water flowing into Pyramid Lake does not mean that the Tribe is receiving ten times the amount [of water] awarded the Tribe in Orr Ditch. TCID Petition at 14. Rather, as the terminus of the Truckee River, Pyramid Lake is the *indirect beneficiary of the Secretary's decision to hold the farmers to no more than their Orr Ditch rights.* (Emphasis added.)

Tr. Br. at 12-13.

Had the Secretary made any such decision as the Tribe claims, this case would never have been brought, since

> the [3.5 afa and 4.5 afa] water duty awarded by the District Court [in the Alpine final decree] has been customarily provided the farmers since before 1926 when TCID began operation of the Newlands Project. *This has also been the water guaranteed the Newlands Project farmers under the Orr Ditch Decree.* (Emphasis added.)

United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 857 (9th Cir. 1983). Clearly, had the Secretary's "decision" been based on the farmers' *Orr Ditch* rights as the Tribe asserts, no reduction in diversions would have been warranted.

Instead, the very basis for the diversion limitation of the operating criteria was the *Tribe v. Morton* court's unequivocal directive to the Secretary of the Interior to "assure the delivery of at least 385,000 acre-feet of water to Pyramid Lake." *Pyramid Lake Tribe v. Morton*, 354 F.Supp. 252, 260 (D.D.C. 1973). Not until the Secretary's responsive limit proposal had been rejected by the *Tribe v. Morton* court and replaced by the draconian figure of 288,129 afa did the Secretary suggest the 1973 limit of 350,000 afa to cushion the blow. That limit cannot be characterized as representing his deliberate and independent judgment as to the amount of water to which the farmers were entitled.

Rather than being the "indirect beneficiary" of the criteria, the Tribe was designedly the instigator and *only* beneficiary of the

diversion limit.[3] Since the fundamental purpose of the criteria was to *assure* that the Tribe would be receiving more than ten times the amount of water awarded it in *Orr Ditch*, *id.*, the Tribe's contention that the decisions below enforcing the criteria are "wholly consistent with *Nevada v. United States*," Tr. Br. at 12, cannot be sustained.

2. Respondents' Denial Of Due Process Violation Is Factually And Legally Untenable.

The United States naively asserts that since the *Tribe v. Morton* decision and the operating criteria expressly state that they do not affect the farmers' *Orr Ditch* rights affirmed by this Court in *Nevada v. United States*, those rights are *ipso facto* unaffected and no constitutional issue is therefore raised. U.S. Br. at 6; *see also* Tr. Br. at 14-15; App. A-6.

There is no question that both the *Tribe v. Morton* decree and the regulations promulgated by the court expressly state that they do not affect decreed rights. Nevertheless actions speak louder than words; a due process violation is not negated by hollow denials. It is undisputed that the criteria's diversion limit was premised on a substantially lower water duty than the *Orr Ditch* decree guaranteed. Tr. Br. at 6; 8 n.9; 13 n.12. And when the farmers, acting through TCID, diverted sufficient water to satisfy those decreed rights, TCID's operation contract was terminated and operation of the project was returned to the Secretary who is "under orders from the [*Tribe v. Morton*] court . . . actively to enforce" the diversion limit. App. A-159.

The ordered reduction of the water rights occurred without any adjudication by a court with jurisdiction over either the holders of those rights—the Newlands farmers—or the res—Truckee River water. Yet the *Tribe v. Morton* court predicated both its analysis

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[3] TCID challenged *all* of the criteria which the District Court held that it had violated. However, only the diversion limit is relevant to this Petition inasmuch as the Ninth Circuit based its entire decision on the fact that the limit was exceeded, and refused to consider whether termination of TCID's operating contract would have been justified on the basis of violation of any of the other challenged criteria. App. A-5; *see* U.S. Br. at 8; Tr. Br. at 17 n.15.

of the validity of the secretary's regulations and its own subsequently approved criteria on a determination that waste of water was, in fact, occurring. This factual determination of waste goes to the very heart of the Project farmers' entitlement to water, and in reality is a determination that they have no right to the amounts claimed (and in this case, decreed). *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 854 (9th Cir. 1983). The Constitution guarantees that rights cannot be thus adjudicated away in the absence of the rightholder. [4]

Nor can such rights be "regulated" away. TCID does not question that the Secretary had multifaceted duties arising from various statutes and that he has a trust obligation to the Indians. Those duties are, however, entirely divorced from his authority under the Reclamation Act. As this Court just held, the United States does not own the Project water rights and is not free to shift them about "like so many bushels of wheat," *Nevada v. United States*, 463 U. S. 110, __; 103 S.Ct. 2906, 2916 (1983), in order to fulfill his non-Reclamation duties and obligations.

If the Secretary felt that TCID's diversions and operations were wasteful, he could have and should have commenced proceedings against TCID to adjudicate that issue. In limiting the historical diversions there is no question that he was acting solely to further non-Reclamation goals, and not pursuant to Section 10 of the Reclamation Act.[5] TCID does not dispute the Secretary's duty to "take steps to prevent wasteful practices and to make

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[4] Even the Tribe appears to concede this elementary point of law, as evidenced by its strained argument that TCID should be bound by *Tribe v. Morton* due to its "privity" with the United States, Tr. Br. at 23 n.18, notwithstanding the United States' repudiation of such representational capacity. *See* U.S. Br. at 5.

[5] Respondents' assertion that the Endangered Species Act gives the Secretary additional regulatory authority to limit Newlands Project diversions, Tr. Br. at 18 n. 16; U.S. Br. at 13, demonstrates that, despite this Court's repeated holdings, respondents still do not understand that the water rights are vested rights belonging to the farmers, not rights with which the United States may deal as it sees fit. *See Nevada v. United States*, 463 U.S. 110, ___; 103 S.Ct. 2906, 2914-2916 (1983).

available for Pyramid Lake any water that is *not* needed to satisfy the vested rights of the Project water users under the *Orr Ditch* decree." U.S. Br. at 13 n.3. TCID's sole contention is that any such "steps" must conform to the procedural due process requirements of the Constitution. Respondents' persistent denial of this fundamental principle warrants this Court's attention.

Respondents' contention that Secretarial power and duties devolving from unrelated statutory delegations authorize the non-adjudicatory limitation of Reclamation Project water rights could, if carried to the extreme, result in their total elimination with the only remedy being an "*Overton Park*" type review[6] Such a notion, apparently acceptable to the courts below, has obvious and important implications to thousands of farmers throughout the West, as we pointed out in our opening brief. Pet. at 26. It deserves this Court's consideration and rejection.

The Tribe's brief in opposition to the Petition acknowledges the significant constitutional issues raised by this case. It squarely asserts that in order to protect vested property rights the holder thereof must intervene in any litigation in which those rights may be implicated, no matter how distant or inconvenient the forum. *See* Tr. Br. at 19-27. In order to support this constitutionally repugnant assertion, the Tribe engages in a novel interpretive exercise that completely distorts the authority relied upon. First, the Tribe argues that the enforcement of the *Tribe v. Morton* court's judgment against TCID and its constituent farmers was a constitutionally permissible action. However, in *Washington v. Washington State, Etc.*, 443 U.S. 658, 693 n.32 (1979), this Court stated that the issuance of court orders affecting the interests of non-parties is sanctioned only in specific situations: (1) when the action is necessary to protect established *public* rights; (2) when the orders are issued in the context of an *in rem* or analogous proceeding; or (3) when the affected persons were

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[6] The courts below held that TCID was not entitled to *de novo* adjudication of the issue of waste but could obtain relief from the water right reduction only if it met the much higher standard for relief from administrative rulemaking action articulated in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). *See, e.g.*, App. A-24; A-9.

adequately represented by a party to the underlying action. None of these circumstances is available to support the decisions below.[7]

Second, the Tribe attempts to characterize the instant action as an impermissible collateral attack on the *Tribe v. Morton* court's judgment,[8] based on on its contention that the District should have intervened in that action and, having failed to do so, is now foreclosed. Tr. Br. at 26. This Court has never endorsed such a position. In fact, it clearly held to the contrary in *Chase Nat. Bank v. City of Norwalk, Ohio,* 291 U.S. 431, 441 (1934):

> The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger . . . Unless duly summoned to appear in a legal proceeding, a person not privy may rest assured that a judgment therein will not affect his legal rights.

The District Court's determination that TCID's actions were impermissible "self-help," *see* App. A-32, and the Ninth Circuit's

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[7]The cases cited by the Tribe, *United States v. Hall*, 472 F.2d 261, 265 (5th Cir. 1972) (order in desegregation case may affect non-parties where necessary to protect court's decision); *Golden State Bottling Company, Inc. v. N.L.R.B.*, 414 U.S. 168, 180-181 (1973) (due process inquiry unnecessary where petitioner had a meaningful opportunity to be heard); and *United States v. United Mine Workers of America*, 330 U.S. 258, 292-293, 293-294 (1947) (petitioner had been an active party in the subject action), illustrate the situations enumerated in *Washington State, supra*, but have no application to the circumstances presented by this action.

[8] The authorization relied upon to illustrate the impact of this characterization are inapplicable to the present case. In *GTE Sylvania, Inc. v. Consumers Union, Etc.*, 445 U.S. 375, 386 (1980), the Court found that a restraining order issued by one district court destroyed the plaintiff's cause of action under the Freedom of Information Act in a second court. No constitutionally protected rights were at stake. In *O'Burn v. Sharp*, 70 F.R.D. 549, 552 (E.D. Pa. 1976), a collateral attack was held impermissible where the purportedly offending consent decree at issue was subject to modification or dissolution by the very court in which the collateral attack was mounted, thereby demonstrating that the original forum was at least convenient.

affirmation of that decision completely abrogates the fundamental constitutional premise underlying the holding in *Chase*. Because the decisions below constitute a significant erosion of Constitutional protection, this Court should review and reverse those decisions.

3. Contrary To The United States' Assertions, Nothing Has Occurred Which Would Lessen The Factual Or Legal Impact Of The Decisions Below.

Finally, the United States has argued that the issues in this case are of no continuing importance because (1) the *Tribe v. Morton* case has now been transferred to a convenient forum and "as a result, either petitioner or individual Project water users *now* [post judgment] have the opportunity to intervene and participate," (2) the Secretary has proposed *new* operating criteria, and (3) the Secretary has allowed TCID to continue operating the Project under a temporary operating contract. U.S. Br. at 14. Rather than demonstrating the unimportance of this case, however, these developments simply underscore the significant constitutional issues involved: (1) Both the Newlands farmers and the *res* of the dispute were absent from the distant and inconvenient forum which determined the operating criteria's factual predicate of "waste" and ordered the reduction of the farmers' water rights based thereon; (2) The criteria published in 1973 pursuant to court order provided an insufficient diversion allowance to satisfy the farmers' decreed entitlements and must now be amended to allow satisfaction of those rights; and (3) The federal court must still initially *approve* any new regulations *before* they can be promulgated, not just review them upon challenge.[9] Thus, even if the farmers eventually obtain criteria which allow their decreed

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[9] Moreover, the United States has not rescinded its termination of the 1926 operating contract. The temporary operating contract between TCID and the United States was entered into solely to preserve the parties' position pending the outcome of this litigation and is terminable at will upon forty-five days' notice. Ironically, its express terms forbid the parties to refer to or rely upon it in this litigation, in order to preclude the inference of mootness the United States has drawn. *See* Supp. App. at SA-3.

rights to be satisfied,[10] the precedential impact of the process approved by the courts below poses a continuing threat to due process guarantees and must be reversed.

4. Conclusion

This Court has never held that one may lose one's vested rights by failing to discover and intervene in a distant action in which those rights may be implicated. This Court has never held that federal courts may formulate and dictate executive decisions, nor that informal rulemaking can operate to divest private rights without procedural due process. Denial of this Petition would leave standing lower court decisions which could be cited as precedent for those propositions. Because of the enormous implications of such doctrines, this Court should review and reverse the decisions below.

Respectfully submitted,

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(Supplemental Appendix follows)

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[10] The Respondents' reliance on the extra-legal principle of "no harm, no foul," Tr. Br. at 13 n.12; U.S. Br. at 14-15, is not convincing in any event. There is no guarantee that any new criteria will provide the Newlands farmers sufficient water, or that the Tribe will not challenge them (leaving only the present inadequate diversion levels). If TCID *does* intervene, will it then be bound by the earlier determination of waste? If it does not intervene, will it be any more successful in persuading a court in a different lawsuit to review the merits of the criteria than it was in this lawsuit? *See* App. A-33.

SUPPLEMENTAL APPENDIX

TEMPORARY OPERATION AND MAINTENANCE AGREEMENT BETWEEN TRUCKEE-CARSON IRRIGATION DISTRICT AND THE UNITED STATES OF AMERICA

Contract No.
4-07-20-X0268

WHEREAS, the Court in *Truckee-Carson District v. Secretary of the Department of the Interior v. Pyramid Lake Paiute Tribe of Indians*, Civ. No. R-74-34 BRT (D.Nev.) entered its order on August 17, 1983 upholding the Secretary's right to terminate the December 18, 1926 agreement between the United States of America, hereinafter referred to as the United States, and the Truckee-Carson Irrigation District, hereinafter referred to as District; and

WHEREAS, the District Court denied District's motion to stay execution of its order, and

WHEREAS, District has appealed the order to the Ninth Circuit Court of Appeals and is presently seeking a stay of execution of the District Court's decision; and

WHEREAS, the 1926 agreement provides for District's operation and maintenance of the Newlands Project; and

WHEREAS, District has continued and desires to continue operation and maintenance of the project; and

WHEREAS, United States is willing to allow District to continue operation and maintenance of the project on certain conditions:

It is therefore agreed that:

1. For the term of this agreement the United States agrees that the District shall continue to have the care, operation and maintenance of all lands and works used for operative purposes, including Lahontan Reservoir lands and Dam; Lake Tahoe lands, Reservoir and Dam, excluding the 64-Acre Tract as described in

the *United States v. Truckee-Carson Irrigation Dist.* No. S-78-611 MLS (E.D. Cal.); the Derby Diversion Dam, lands and Reservoir; Lahonton Power Plant (subject to existing leases); Carson Lake pasture, and all other lands, dams, diversion works, buildings, canals, laterals, sublaterals, ditches, distribution and drainage systems, stock water pipelines, power distribution lines, telephones and telephone lines, the Fallon office records, files, engineering maps and data, (which records, files, engineering maps and data shall be available at all times for use by the United States) and any other works now operated, owned or used by the United States in connection with the irrigation and development of lands of the Newlands project. No title to any of the works in this paragraph mentioned passes to the District.

2. The District hereby agrees to continue to be responsible for the care, operation and maintenance of the above-referenced works, and will care for, operate and maintain the same and deliver water therefrom in full compliance with the National Reclamation Law, as said laws now exist or as they may hereafter be amended or supplemented; court orders and decrees; contracts heretofore entered into between the United States and various persons for the delivery of water; the terms and conditions of this agreement; the applicable rules and regulations of the Secretary now in force or hereafter promulgated; and, in such manner that said transferred works shall remain in as good and efficient condition and of equal capacity for the development, diversion and distribution of irrigation water and for the development of power as is now the case, reasonable wear and damage by the elements excepted, and will use all proper methods and precautions to secure the economical and beneficial use of irrigation water, the said operation and maintenance and control of said transferred works to be without expense to the United States, except as to its lands benefiting therefrom.

3. The Secretary shall cause to be made from time to time a reasonable inspection of the transferred works to ascertain whether the terms of this contract are being satisfactorily executed by the District. Such inspection shall include examinations of the transferred property and the books, records, and papers of the District, together with examinations in the office of the

Bureau of Reclamation of all contracts, papers, plans, records and programs connected with the said property. The examinations and evaluations for operation and maintenance will be without cost to the District, except for such costs incurred by the District and/or its agents to provide access, to operate any mechanical or electrical equipment, and to participate in the examination of the project works. The actual cost to the United States for all other inspections shall be reimbursed by the District to the United States.

4. No substantial change in any of the transferred works shall be made by the District without first having had and obtained the written consent of the Secretary, and the Secretary's opinion as to whether any change in any of the transferred works is or is not substantial shall be conclusive and binding upon the parties hereto. The District shall promptly make any and all repairs to the transferred works which in the opinion of the Secretary are deemed necessary for the proper care, operation and maintenance of the transferred works, or may cause the repairs to be made and charge the cost thereof to the District, and the District shall make, levy and collect sufficient operation and maintenance assessments to pay the same to the United States in addition to providing the necessary funds to meet the other obligations of the District. The cost to the United States of making any of the repairs contemplated by this article shall be repaid by the District to the United States together with and in addition to the first installment of charges falling due hereunder thereafter.

5. The District shall save the United States, its officers, agents, servants, and attorneys, harmless as to any and all damages which may in any manner grow out of the care, operation and maintenance of the transferred works.

6. This agreement shall not be utilized by the United States or the District in *Truckee-Carson Irrigation District v. Secretary of the Department of the Interior v. Pyramid Lake Paiute Tribe of Indians*, Civ. No. R-74-34 BRT (D.Nev.) or in the appeal of said case or in *United States v. Truckee-Carson Irrigation District*, No. S-78-611 MLS (E.D.Cal.) or in any other litigation.

7. If the final result of the appeal in the case of *Truckee-Carson Irrigation District v. Secretary of the Department of the Interior v. Pyramid Lake Paiute Tribe of Indians*, Civ. No. R-74-34 BRT (D.Nev.) is a reversal in whole or in part of the district court's order, it is agreed that this agreement shall not be construed to affect the December 18, 1926 contract.

8. The United States or TCID have the option to terminate this agreement by giving 45 days prior written notice of termination. Termination shall be effective on the 46th day after notice.

9. Any notice, demand, or request authorized or required by this contract, shall be deemed to have been given, on behalf of the United States, when mailed, postage prepaid, to Truckee-Carson Irrigation District at Newlands Project, P.O. Box 1356, Fallon, Nevada 89406, or to the United States when mailed, postage prepaid to the Regional Director, Mid-Pacific Region, Bureau of Reclamation, 2800 Cottage Way, Sacramento, CA 95823.

Dated: February 14, 1984

/s/ David S. Houston
Regional Director
Mid-Pacific Region
Bureau of Reclamation

/s/ Ygnacio H. Laca
President
Board of Directors
Truckee-Carson Irrigation District